



28 Section 1. Section **63-97-101** is enacted to read:

29 **CHAPTER 97. UNFAIR PUBLIC COMPETITION ACT**

30 **63-97-101. Title.**

31 This chapter is known as the "Unfair Public Competition Act."

32 Section 2. Section **63-97-102** is enacted to read:

33 **63-97-102. Definitions.**

34 As used in this chapter:

35 (1) "Commercial activity" means performing services or providing goods which can  
36 normally be obtained from private enterprise.

37 (2) "Commission" means the Private Enterprise Review Commission created in Section  
38 63-97-103.

39 (3) "Competitive impact statement" means a cost analysis using uniform accounting  
40 standards accepted by private enterprise to determine the total cost of the commercial activity. The  
41 cost analysis shall include an analysis of the impact the commercial activity has on state and local  
42 tax revenues.

43 (4) "Government agency" or "agency" means a department, office, division, authority,  
44 commission, institution, board, or other agency of government, or any other governmental unit or  
45 political subdivision existing in the state or any other creation of the state or political subdivision  
46 of the state, regardless of whether funds are appropriated to such agency.

47 (5) "Institution of higher education" or "institution" means a college, university, or  
48 community college supported by the state.

49 (6) "Private enterprise" means an individual, firm, partnership, joint venture, corporation,  
50 association, or any other legal entity engaging in the manufacturing, processing, sale, offering for  
51 sale, rental, leasing, delivery, dispensing, distributing, or advertising of goods or services for profit.

52 (7) "Uniform accounting standards" means an accounting method which allows  
53 government agencies and institutions of higher education to identify the true and total cost of  
54 supplying goods and services in the same manner as private enterprise would identify true and total  
55 costs, including the following:

56 (a) labor expenses, including direct wage and salary costs, training costs, overtime, and  
57 supervisory overhead;

58 (b) total employee fringe benefits and other personnel expenses;

59 (c) operating costs including vehicle maintenance and repair, marketing, advertising and  
60 other sales expenses, office expenses, billing, and insurance expenses;

61 (d) real estate and equipment costs, debt service costs, and a proportionate amount of other  
62 agency overhead and capital expenses including vehicle depreciation and depreciation of other  
63 fixed assets such as buildings and equipment;

64 (e) contract management costs;

65 (f) the imputed tax impact of the activity if the entity were required to pay federal, state,  
66 and local taxes; and

67 (g) any other cost particular to the business or industry supplying the goods or services.

68 Section 3. Section **63-97-103** is enacted to read:

69 **63-97-103. Private Enterprise Review Commission -- Members -- Terms -- Duties.**

70 (1) There is created the Private Enterprise Review Commission composed of nine  
71 members.

72 (2) The governor shall appoint:

73 (a) four owners or officers of businesses located in the state;

74 (b) one administrative officer or executive director of a government agency;

75 (c) one representative from an institution of higher education;

76 (d) one representative from a political subdivision of the state; and

77 (e) two members from the general public.

78 (3) (a) Except as required by Subsection (3)(b), commission members shall serve four-year  
79 terms.

80 (b) Notwithstanding the requirements of Subsection (3)(a), the governor shall, at the time  
81 of appointment or reappointment, adjust the length of terms to ensure that the terms of the  
82 commission members are staggered so that approximately half of the commission is appointed  
83 every two years.

84 (4) (a) Each commission member shall hold office until his successor has been appointed  
85 and qualified.

86 (b) When a vacancy occurs in the membership for any reason, the replacement shall be  
87 appointed for the unexpired term.

88 (c) Five members of the commission are a quorum for the purpose of organizing the  
89 commission and conducting the business of the commission.

90 (d) The vote of a majority of members voting when a quorum is present is necessary for  
91 the commission to take action.

92 (5) (a) At the initial meeting of the commission, the commission shall select one of their  
93 number to serve as chair of the commission.

94 (b) The commission shall meet at least quarterly and at the call of the chair.

95 (6) (a) (i) Members who are not government employees shall receive no compensation or  
96 benefits for their services, but may receive per diem and expenses incurred in the performance of  
97 the member's official duties at the rates established by the Division of Finance under Sections  
98 63A-3-106 and 63A-3-107.

99 (ii) Members may decline to receive per diem and expenses for their service.

100 (b) (i) State government officer and employee members who do not receive salary, per  
101 diem, or expenses from their agency for their service may receive per diem and expenses incurred  
102 in the performance of their official duties from the commission at the rates established by the  
103 Division of Finance under Sections 63A-3-106 and 63A-3-107.

104 (ii) State government officer and employee members may decline to receive per diem and  
105 expenses for their service.

106 (7) The commission shall:

107 (a) make rules in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking  
108 Act, to:

109 (i) implement the provisions of this chapter;

110 (ii) promptly hear and resolve complaints lodged under Section 63-97-105; and

111 (iii) to establish privatization standards, procedures, and requirements;

112 (b) review whether or not certain services performed by existing government agencies and  
113 institutions of higher education could be privatized to provide the same types and quality of  
114 services that would result in cost savings;

115 (c) hold public hearings on government competition with private enterprise, including  
116 proposals to prohibit commercial activities by government agencies which compete with private  
117 enterprise;

118 (d) maintain communication with and access information from, other entities promoting  
119 privatization;

120 (e) prepare an annual report that contains:

- 121 (i) information about the commission's activities;  
 122 (ii) action taken by the commission with respect to complaints filed under Section  
 123 63-97-105;  
 124 (iii) recommendations on privatizing government services; and  
 125 (iv) recommendations regarding proposed legislative amendments to Section 63-97-104,  
 126 including additional commercial activities to be prohibited or general standards and exemptions  
 127 relating to the prohibition of government competition with private enterprise;  
 128 (f) submit the annual report to the Legislature and the governor;  
 129 (g) file copies of its recommendations for privatization with:  
 130 (i) the relevant agency head;  
 131 (ii) the governor's office; and  
 132 (iii) the Office of Legislative Fiscal Analyst for submission to the relevant legislative  
 133 appropriation subcommittee; and  
 134 (h) file copies of its proposed legislative amendments to Section 63-97-104 with the Office  
 135 of Legislative Research and General Counsel.  
 136 (8) (a) The commission may appoint advisory groups to conduct studies, research,  
 137 analyses, and make reports and recommendations with respect to subjects or matters within the  
 138 jurisdiction of the commission.  
 139 (b) At least one member of the commission shall serve on each advisory group.  
 140 (9) This chapter does not preclude any agency from privatizing any service or function  
 141 independently of the commission if:  
 142 (a) there is no statutory mandate requiring the agency to provide the service or perform the  
 143 function that is to be privatized; and  
 144 (b) any statutory provisions relating to or referencing the service or function to be  
 145 privatized are repealed or amended to be consistent with the privatization of the service or  
 146 function.  
 147 Section 4. Section **63-97-104** is enacted to read:  
 148 **63-97-104. General policy statement regarding public-private competition --**  
 149 **Prohibition of certain government competition with private enterprise -- Exceptions.**  
 150 (1) It is the general policy of the state that a government agency or institution of higher  
 151 education should not begin or maintain any commercial activity to provide goods or services for

152 the use of other government agencies or institutions of higher education or for public use if such  
153 goods or services can be procured from private enterprise through ordinary business channels.

154 (2) A government agency or institution of higher education, except as provided in  
155 Subsection (3), shall not engage in any of the following commercial activities:

156 (a) the operation of a retail pharmacy;

157 (b) the operation of an environmental testing laboratory; or

158 (c) engineering consulting.

159 (3) (a) A government agency or institution of higher education is authorized to perform  
160 or provide a commercial activity listed in Subsection (2) if:

161 (i) the activity is specifically authorized by statute;

162 (ii) no private enterprise source is capable of providing the needed goods or services;

163 (iii) use of a private enterprise source would cause unacceptable delay or disruption of an  
164 essential program; or

165 (iv) the government agency or institution of higher education can provide or is providing  
166 goods or services to government agencies or institutions of higher education on a continuing basis  
167 at a lower total cost than if the goods or services were obtained from private enterprise as  
168 determined by cost comparisons as outlined in a competitive impact statement.

169 (b) An institution of higher education is authorized to perform or provide a commercial  
170 activity listed in Subsection (2) when the commercial activity is a recognized and integral part of  
171 a teaching, educational, or research program leading to a degree or certificate that supports the  
172 mission of the institution.

173 (c) Notwithstanding the provisions of Subsection (2), a government agency is authorized  
174 to provide environmental testing laboratory services to the Department of Environmental Quality.

175 (4) If a government agency or institution of higher education is authorized under the  
176 exception listed in Subsection (3)(a)(iv) to engage in an otherwise prohibited commercial activity,  
177 the government agency or institution of higher education shall:

178 (a) prepare a competitive impact statement relating to the commercial activity and submit  
179 the competitive impact statement to the commission;

180 (b) set a fee or charge a price for that commercial activity which shall include the true and  
181 total cost related to engaging in the activity by the government agency or institution of higher  
182 education, including:

183 (i) the fair market value of the commercial activity; and  
184 (ii) the direct and indirect costs incurred in engaging in the commercial activity determined  
185 by use of uniform accounting standards; and

186 (c) prepare a detailed request for proposal which will be widely disseminated within  
187 segments of private enterprise which normally engage in the commercial activity in order to obtain  
188 firm bids or proposals for the activity requested.

189 (5) Government agencies and institutions of higher education shall adopt and implement  
190 procedures to monitor their own compliance with this chapter.

191 (6) Any health sciences center or medical center of any institution of higher education and  
192 any of its departments, offices, divisions, or authorities are exempt from the provisions of this  
193 section.

194 Section 5. Section **63-97-105** is enacted to read:

195 **63-97-105. Complaints.**

196 (1) (a) Any person who believes that a government agency or institution of higher  
197 education has violated Subsection 63-97-104(2) may file a written complaint with the commission  
198 and with the affected agency or institution stating the grounds for the complaint.

199 (b) After receiving a complaint filed under Subsection (1)(a), the commission shall review  
200 the complaint at its next regularly scheduled meeting to determine whether the complaint presents  
201 a good-faith claim of a violation of this chapter. If the commission determines that the claim  
202 presented in the complaint is made in good faith and not for the purpose of harassment, the  
203 commission shall notify the claimant and the affected government agency or institution of higher  
204 education in writing of the determination and shall require the agency or institution to respond to  
205 the complaint.

206 (c) Upon receipt of the notice described in Subsection (1)(b), the affected agency or  
207 institution shall have 30 days to respond to the commission in writing, either admitting or denying  
208 each of the allegations made in the complaint, and indicating whether remedial action will be  
209 taken.

210 (d) If the affected agency or institution admits the allegations made in the complaint and  
211 agrees to take remedial action, the commission shall work with the affected agency or institution  
212 to ensure that appropriate remedial action is taken on a timely basis.

213 (e) If the affected agency or institution denies any of the substantive allegations made in

214 the complaint, the commission shall hold a public hearing on the complaint within 60 days of the  
215 denial where all parties are afforded an opportunity to present evidence on the matter.

216 (2) After the public hearing under Subsection (1)(e), the commission shall determine  
217 whether the government agency or institution of higher education is authorized to engage in the  
218 commercial activity or is in violation of the provisions of this chapter.

219 (3) (a) If, after a public hearing, the commission rules in favor of the government agency  
220 or institution of higher education and against the complainant, the commission may require the  
221 complainant to pay the costs incurred by the commission in reviewing the complaint and  
222 conducting the public hearing, not to exceed \$1,000.

223 (b) All money collected under Subsection (3)(a) shall be deposited into the General Fund.

224 (4) If a government agency or institution of higher education is found to be in violation  
225 of this chapter, the commission shall take the necessary steps to terminate the commercial activity  
226 and require, if appropriate, the government agency or institution of higher education to implement  
227 a contract with the private sector for the activity.

228 (5) Within 30 days after the public hearing, the commission shall issue a report of its  
229 findings to the complainant and the government agency or institution of higher education.

230 (6) If, under the commission's decision, the government agency or institution of higher  
231 education is to terminate its commercial activity, the action shall take place under a schedule set  
232 by the commission.

233 Section 6. Section **63-97-106** is enacted to read:

234 **63-97-106. Cease and desist orders.**

235 (1) If the government agency or institution of higher education fails to comply with the  
236 commission's order, the commission may file an action in district court to restrain and enjoin the  
237 government agency or institution of higher education from engaging in the activity.

238 (2) The attorney general's office shall provide legal support to the commission for any  
239 action filed under Subsection (1).

240 Section 7. Section **63-97-107** is enacted to read:

241 **63-97-107. Staff support.**

242 The Division of Purchasing and General Services within the Department of Administrative  
243 Services shall provide staff support to the commission.

244 Section 8. **Repealer.**

245           This act repeals:  
246           Section **63-55a-1, Definitions.**  
247           Section **63-55a-2, Privatization Policy Board -- Created -- Membership -- Operations**  
248 **-- Expenses.**  
249           Section **63-55a-3, Privatization Policy Board -- Duties.**

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**Legislative Review Note**  
**as of 1-15-99 9:16 AM**

A limited legal review of this legislation raises no obvious constitutional or statutory concerns.

**Office of Legislative Research and General Counsel**